Supreme Court, U.S.
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*In The*
*Supreme Court Of The United States*

**October Term, 1996**

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**In re:**
**NEW VALLEY CORPORATION,**
**Reorganized Debtor.**

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**ADMINISTRACION NACIONAL DE TELECOMUNICACIONES ("ANTEL"),**

**PETITIONER,**

**v.**

**NEW VALLEY CORPORATION,**

**RESPONDENT.**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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# *PETITION FOR CERTIORARI*

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66 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower courts erred in permitting the Respondent bankruptcy debtor to arrange for the mailing to all creditors of the notice of the deadline for filing proofs of claim in the Respondent's bankruptcy case without implementing safeguards or requiring the Respondent to maintain records of the mailing in order to ensure that notices were sent to all creditors.

2. Whether the lower courts erred in barring the Petitioner from presenting evidence demonstrating that the Petitioner did not receive notice of the deadline for filing proofs of claim in the Respondent's bankruptcy case, when the Petitioner sought to introduce the evidence in order to rebut the presumption of receipt after mailing.

3. Whether the appellate courts below erred in deferring to the Bankruptcy Court's finding that the Petitioner was not entitled to file a late proof of claim on the grounds of excusable neglect, when the Bankruptcy Court refused to apply the excusable neglect standard recently established by this Court.

## PARTIES BELOW

The caption of the case contains the names of all parties below. The parties below are not controlled by parent companies and do not own subsidiaries.

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## OPINIONS BELOW

On April 7, 1995, Judge Novalyn L. Winfield of the United States Bankruptcy Court for the District of New Jersey orally denied the Petitioner's motion to file a late proof of claim in the Respondent's Chapter 11 bankruptcy case. A transcript of the hearing appears in the Appendix at A-3.

On the same date, the Bankruptcy Court issued a written order denying the Petitioner's motion to allow a late-filed claim. The unpublished order is set forth in the Appendix at A-1.

On October 27, 1995, the United States District Court for the District of New Jersey issued an unpublished opinion and order affirming the Bankruptcy Court's decision to deny the Petitioner's motion to allow its claim. The District Court's opinion and order are reproduced in the Appendix at A-23.

On September 26, 1996, the United States Court of Appeals for the Third Circuit issued an unpublished, per curiam order affirming the district court's decision. The Third Circuit's opinion appears in the Appendix at A-32.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The Third Circuit's September 26, 1996 order constituted the final disposition of the case.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**(b) Enlargement**

**(1) In general**

Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1).

## STATEMENT OF THE CASE

As outlined below, the decisions of the lower courts in this case operated to deprive the Petitioner, an instrumentality of the government of El Salvador, of any right to recover from the Respondent nearly a quarter of a million United States dollars—a very substantial sum from the standpoint of the Salvadoran government. The courts below refused to permit the Petitioner to file in the Respondent's bankruptcy case a claim for the funds the Petitioner had earned from the Respondent over a five-year period because the Petitioner did not file its proof of claim before the court-imposed deadline for filing proofs of claim.

The lower courts refused to permit the Petitioner to file its claim after the deadline notwithstanding the fact that the Petitioner had no knowledge of the Respondent's bankruptcy case until after the deadline had passed. The Bankruptcy Court precluded the Petitioner from presenting evidence demonstrating that the notice of the deadline was not delivered to the Petitioner. Further, the Bankruptcy Court, after stating that it disapproved of this Court's recent opinion liberally construing the excusable neglect standard, declined to apply the standard set forth by this Court.

### Statement of Facts

The Petitioner, Administracion Nacional de Telecomunicaciones ("Antel"), an instrumentality of the government of El Salvador, administers El Salvador's telecommunications network. New Valley Corporation (the "Debtor") was formed in 1987 from a merger of Western Union, WU World, and ITT. Between July 1985 and December 1990, the Debtor and its predecessors incurred debt to Antel in the amount of $225,657.43 by virtue of their utilization of Antel's telex transmission networks.

An involuntary Chapter 11 bankruptcy case was filed against the Debtor on November 15, 1991 by three individual bondholders; on March 31, 1993, the Debtor consented to the entry of an Order for Relief under § 301 of the Bankruptcy Code. By Order dated June 21, 1993, the Bankruptcy Court established September 30, 1993 (the "Bar Date") as the last date on which creditors could file proofs of claim in the Debtor's bankruptcy case.

Apparently under the authority of Fed. R. Bankr. P. 2002(a)—which requires that notice of the time fixed for filing proofs of claim in a Chapter 11 case be given by "the clerk, or some other person as the court may direct"—the Bankruptcy Court permitted the Debtor to arrange for the mailing of notice of the Bar Date to all creditors through a private mailing service. The Debtor fashioned a four-page form document describing, in English, the various classes of creditors in the Debtor's bankruptcy case, explaining whether members of the respective classes were required to file, or had the option to file, proofs of claim, and stating that proofs of claim were required to be filed no later than the Bar Date.

Numerous irregularities accompanied the mailing. The Debtor hired a mailing service, Logan & Company ("Logan"), to mail the Bar Date notices to all scheduled creditors in the Debtor's case. Logan, in turn, hired a second company to generate labels, affix the labels on envelopes, and fold and stuff the notices into the envelopes. Although Logan's president testified that a representative of Logan monitored the second company's work, he stated at deposition that he could not remember which Logan employee monitored the second company and that Logan maintained no records that would have indicated who oversaw the second company's operation. Logan's president acknowledged that, after the second company had stuffed the envelopes, no representative of Logan double-checked the envelopes to ensure that an envelope had

been addressed to every intended recipient. He also admitted that his affidavit of mailing contained several incorrect dates.

Not surprisingly, given the slipshod procedures by which the notices of Bar Date were allegedly mailed, it can be inferred from circumstantial evidence that the notices were not properly mailed to all creditors, particularly to international creditors. In addition to Antel, three other international telecommunications carriers later complained that they had not received notice of the Bar Date. However, although 213 of the Bar Date notices addressed to *domestic* creditors were returned as undelivered, not one such letter directed to *international* creditors was returned. Moreover, although it was later established that one international creditor, a Guatemalan telecommunications carrier, did not receive the Bar Date notice because the Debtor's records showed an incorrect address for that creditor, the letter allegedly sent to the Guatemalan creditor was never returned to the Debtor as undelivered.

All previous correspondence from the Debtor to Antel had been addressed to particular English-speaking executives of Antel. According to the Debtor's agent, the package containing the Bar Date was addressed to Antel generally and did not specify a particular employee of Antel.

The Debtor also published notice of the Bar Date on July 6, 1993 and on July 9, 1993 in four newspapers published in the United States, the *Wall Street Journal*, the *New York Times*, the *Newark Star-Ledger*, and the *USA Today*.

Antel's management never received the notice of the Bar Date. Assuming that the Debtor actually mailed the notice to Antel, only two explanations for the fact that the notice was not delivered to Antel's management are possible: Either the notice was lost in the postal system of the United States or El Salvador, or the notice was delivered to Antel's mailroom but not thereafter forwarded to an English-speaking executive of

Antel—perhaps because the form of notice resembles English-language junk-mail advertisements commonly sent in the mail. Because Antel's management did not receive notice of the Bar Date—and, in fact, was not even aware that the Debtor was involved in bankruptcy proceedings—Antel did not file a proof of claim before the Bar Date.[1]

On October 28, 1993, 28 days after the Bar Date had passed, a proof of claim in the amount of $135,003.50 was filed on Antel's behalf by the American Telephone and Telegraph Company (AT&T). AT&T had purchased certain of the Debtor's assets in July 1990. As a result, AT&T was concerned that entities such as Antel would seek to impose successor liability upon AT&T if the carriers' rights to recover from the Debtor's estate were discharged in the Debtor's bankruptcy case. Accordingly, AT&T filed proofs of claim on behalf of Antel and about 40 other international carriers, representing more than $2 million in indebtedness. AT&T filed the claims on behalf of Antel and other carriers under the authority of Fed. R. Bankr. P. 3005(a), which permits an entity that is "liable with" the debtor to a creditor to file a proof of claim on behalf of the creditor within 30 days after the deadline for filing proofs of claim.

Other than the notice of the Bar Date, the only other mailing directed to Antel by the Debtor in the entire bankruptcy case was a disclosure statement hearing form. The envelope containing the form was addressed to Antel c/o AT&T. Antel never received the form. Whether AT&T simply chose not to forward the form to Antel or the form was

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[1]The Debtor listed Antel's claim as "disputed, contingent, or unliquidated," notwithstanding the fact that the Debtor had never denied its liability to Antel. If the Debtor had not mischaracterized the debt as disputed, Antel would have been entitled to a distribution regardless of whether it filed a proof of claim. Fed. R. Bankr. P. 3005(c)(2).

lost in transmission,[2] Antel was deprived of notice of the disclosure statement and confirmation dates contained in the form.

On October 26, 1994, the Debtor and AT&T executed an agreement (the "Indemnification Agreement"). The Indemnification Agreement required the Debtor to set aside funds to reimburse AT&T for amounts which AT&T expected to disburse to international carriers in satisfaction of amounts owing to the carriers due to the Debtor's use of the carriers' telex transmission networks.

The Indemnification Agreement listed Antel within a class of creditors (the "Rule 3005 Claimants") on behalf of which AT&T had filed proofs of claim pursuant to Bankruptcy Rule 3005(1). The agreement required the Debtor to place into escrow $2 million; $750,000 of that amount could be withdrawn by AT&T for the purpose of reimbursing AT&T for

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[2]According to Logan's records, 511 of the disclosure statement hearing forms were returned as undeliverable. There is no explanation for the fact that over twice the number of mailings were returned at the time of the second mailing to creditors—about five months after the Bar Date notice had been sent—when Logan presumably should have taken steps in the interim to update the addresses of creditors.

*One* disclosure statement hearing form addressed to an international creditor was returned as undeliverable. The notice to Israel was returned for insufficient postage; the envelope bears a meter stamp reflecting that only 29¢ postage had been affixed.

In any event, the facts surrounding the second mailing to creditors provides compelling circumstantial evidence that the procedures for providing required notices to creditors in this case were grossly lacking.

amounts set off or otherwise collected from AT&T by Rule 3005 Claimants. The agreement further provided that the Debtor was entitled to withdraw from the account, one year and one day after the date of confirmation of the Debtor's plan of reorganization, any amounts exceeding $1.5 million. Finally, one year and one day after the plan's "Effective Date"—the date of distribution to creditors pursuant to the confirmed plan—the agreement permitted the Debtor to withdraw all amounts remaining in the account.

The Indemnification Agreement expressly contemplated the likelihood that claimants such as Antel would be permitted to file late proofs of claim in the Debtor's bankruptcy case. Indeed, the agreement provided for payment in full of such late-filed claims:

> The PTT Direct Claims set forth in Appendix 1 [listing all foreign telecommunications carriers who had timely filed proofs of claim against the Debtor] hereto shall be allowed in full against the Debtor in the Bankruptcy Case. Additionally, during the period from the [date on which the Bankruptcy Court approves the Indemnification Agreement] to the date upon which a confirmed plan of reorganization becomes effective in the Bankruptcy Case (the "Effective Date"), *if any PTT Carrier is permitted by the Bankruptcy Court to file a late-filed proof of claim with respect to any PTT Claim on the grounds of excusable neglect or otherwise, Appendix 1 hereto shall be amended accordingly to reflect such additional PTT Direct Claims (the "Additional PTT Direct Claims"), and such Additional PTT Direct Claims shall be allowed in full against the Debtor in the Bankruptcy Case.*

(Indemnification Agreement ¶ 4 at 5 (emphasis added).)

The Indemnification Agreement further provided that "AT&T shall take no action to notify any PTT Carrier of the terms of this Settlement Agreement." (*Id.* ¶ 11 at 10.) Indeed, the Bankruptcy Court ensured that no notice would be received by Antel by giving its seal of approval to the agreement which prohibited AT&T—presumably at peril of contempt sanctions—from notifying the international carriers that funds had been set aside to pay their claims.[3]

As of March 12, 1996, the Debtor had paid only $535,262.28 to AT&T through the reimbursement provisions of the Indemnification Agreement for the benefit of Rule 3005 Claimants. Thus, if Antel's proof of claim were allowed, all or almost all of Antel's claim could be paid from the funds in the escrow account earmarked for the Rule 3005 Claimants. Moreover, the reorganized Debtor is functioning and solvent so that collection of Antel's claim in full would be virtually

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[3]The concealment of the settlement agreement from creditors violated Fed. R. Bankr. P. 2002(a), which provides, in relevant part, as follows:

> [T]he clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of . . . (3) the hearing on approval of a compromise or settlement of controversy . . . , unless the court for cause shown directs that notice not be sent.

The Bankruptcy Court did not make, and, indeed, could not have reasonably made, a finding that "cause" existed for concealing the terms of the Indemnification Agreement from prepetition creditors of the Debtor.

certain, even if insufficient funds were on hand in the escrow account.

The Debtor filed a plan of reorganization on November 24, 1993. On November 1, 1994, the Bankruptcy Court entered an order confirming the plan. The reorganization plan as confirmed provided for 100% payment of all claims.[4]

Meanwhile, beginning in 1990, Antel, unaware of the fact of the bankruptcy, had made several written demands to the Debtor for payment. In fact, in August 1992, in response to Antel's correspondence, the Debtor sent Antel a letter offering to settle the claim at a discounted amount. When Antel refused, its subsequent written demands for payment went unanswered. In or about August of 1994, Antel directed its attorney in the United States to contact the Debtor. The attorney thereafter learned of the Debtor's bankruptcy reorganization proceedings.

On January 13, 1995, Antel filed its proof of claim in the amount of $225,647.43, along with a motion requesting allowance of its late-filed claim.

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[4]Notwithstanding the fact that the reorganized Debtor was capable of satisfying all its prepetition creditors, Judge Winfield denied the application of the creditors for interest on their claims. In response to this decision, Congress amended the Bankruptcy Code. *See* 140 Cong. Rec. H10768 (daily ed. Oct. 4, 1994), *reprinted in* App. 4 Lawrence P. King, *Collier on Bankruptcy* at XLI-24 (15th ed. 1996) ("In a recent Bankruptcy Court decision in In re New Valley Corp., 168 B.R. 73 (Bankr. D.N.J. 1994), unsecured creditors were denied the right to receive postpetition interest on their allowed claims even though the debtor was liquidation and reorganization solvent. . . . In order to preclude this unfair result in the future, the Committee finds it appropriate to delete section 1124(3) from the Bankruptcy Code").

## Proceedings Below

At the hearing relating to Antel's motion to file a late proof of claim, the Bankruptcy Court issued several rulings pertinent to this appeal. First, the court refused to hear the testimony of two executives of Antel who had flown to New Jersey from El Salvador in order to testify that an extensive investigation of Antel's records had revealed no trace of the Bar Date notice. (A-7.) The court also denied Antel's request to admit Antel's mailing logs as evidence. (*Id.*)

Although it had refused to hear testimony and to consider documentary evidence indicating that Antel had never received the Bar Date notice, the Bankruptcy Court nevertheless determined that Antel had failed to rebut the presumption that Antel had received the notice. The court's explanation for its decision, however, seemed to indicate some confusion as to the nature of the presumption:

> I think that by following the procedures I've just outlined, [Logan] and thereby the debtor have satisfied the presumption that the notice was sent. And therefore have both likewise, the presumption works that the presumption of the sending of the notice leads to a presumption that the notice was received. Where there is a correct address. I think you get into some difficulties where there's an incorrect address and the debtor had knowledge particularly that, or had been provided with the correct address.

(A-18.)

The Bankruptcy Court then turned to Antel's argument that Antel should be permitted to file a late proof of claim because its failure to file its claim on time was the result of excusable neglect. The court declined to consider the factors

which, as this Court instructed in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 113 S. Ct. 1489 (1993), must be weighed in determining whether a party's neglect of a claims bar date is "excusable." The Bankruptcy Court stated:

> I am not a big fan of the Pioneer decision in the first instance. I think that decision runs counter to the need in bankruptcy cases in general to have certitude and finality in the proof of claims process.

(A-19.)

The Bankruptcy Court then seemed to apply the standard which was expressly rejected by this Court in *Pioneer*—that *any* fault on the part of the creditor defeats a claim of excusable neglect.[5] And the Bankruptcy Court apparently concluded that Antel was at fault in not filing its claim before the Bar Date:

> It seems equally likely to me here that parties simply didn't recognize what the document was that was received. And that problem I think has to lie with the recipient rather than with the debtor, who I don't think in a bankruptcy has to be charged with the obligation to print every notice in every foreign language of every country to which it might be sending communications.

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[5]The *Pioneer* Court stated: "[R]eading Rule 9006(b)(1) inflexibly to exclude every instance of an inadvertent or negligent omission would ignore the most natural meaning of the word 'neglect' and would be at odds with the accepted meaning of that word in analogous concepts." 113 S. Ct. at 1498.

(A-19.)

When the hearing was concluded, the Bankruptcy Court issued a written order denying Antel's motion to allow a late-filed claim. (A-1.)

On October 27, 1995, the United States District Court for the District of New Jersey affirmed. The District Court seemed to accept the Bankruptcy Court's analysis that proof of mailing creates a presumption of receipt which cannot be rebutted by the addressee:

> The Bankruptcy Court's conclusion that Antel failed to rebut [the] presumption [of receipt after mailing] was well-grounded in the record before the court. Notably, the Bankruptcy Court found that, even though [the Debtor's agent] did not personally mail the notice to Antel, he followed "a procedure that was in place for noticing [that] had sufficient safeguards in it such that the mailing was accurately made." (A.123). The Bankruptcy Court found further proof of mailing in the fact that, while many notices were sent to New Valley's numerous creditors of record, "relatively few [were] returned." (*Id.*). Given these findings, the Bankruptcy Court's determination that Antel received notice of the bar date was not clearly erroneous.

(A-30.)

The District Court also upheld the Bankruptcy Court's finding that Antel's late filing was not the result of excusable neglect. The court discussed only two of the factors delineated in the *Pioneer* case—the danger of prejudice to the bankruptcy

debtor and the potential impact of the late filing on the judicial proceedings—as follows:

> The Bankruptcy Court determined that allowing Antel to file a late proof of claim would prejudice Antel. Considering the settlement agreement negotiated between AT&T and [the Debtor], the Bankruptcy Court did not abuse its discretion. [The Debtor] and AT&T negotiated in light of the claims that had been filed against [the Debtor] at the time of the negotiations. Allowing a late proof of claim could therefore deprive [the Debtor] of the benefit of its bargain with AT&T regarding the PT&T Claims.
>
> Further, the Bankruptcy Court determined that allowing Antel to file their claim in January 1995, months after the deadline and the confirmation of [the Debtor's] Reorganization Plan, would negatively impact both the parties' and the judicial interest in finality. This decision, too, is not an abuse of discretion.

(A-30-31.)

On September 26, 1996, the United States Court of Appeals for the Third Circuit affirmed the District Court's decision, "essentially for the reasons set forth in the [district court's] opinion." (A-33.)

Antel thereafter filed this Petition for Certiorari in a timely fashion.

## REASONS FOR GRANTING THE WRIT

As discussed below, the lower courts in this case erred in their disposition of three issues of considerable national importance. First, the lower courts erred in turning over to the Debtor the responsibility for mailing the Bar Date notices without implementing adequate safeguards to ensure that the notices would actually be sent to all creditors. Such a departure from the usual course of judicial conduct calls for an exercise of this Court's supervisory power. Sup. Ct. R. 10(a).

Second, the courts erred in depriving Antel of the right to attempt to rebut the presumption of receipt after mailing. A split exists among the Circuits as to an addressee's right to rebut the presumption of receipt after proper mailing has been established; a Circuit split justifies review on certiorari. Sup. Ct. R. 10(a); *see, e.g., Braxton v. United States*, 500 U.S. 344 (1991).

The third fundamental error committed by the courts below was their disregard of this Court's instruction as to the liberal standard to be employed in determining whether a late filing is justified under the excusable neglect standard. A failure by a lower court to adhere to a decision of this Court is grounds for granting a writ of certiorari. Sup. Ct. R. 10(c); *see Fure Oil Co. v. Suarez*, 384 U.S. 202 (1966); *Heflin v. United States*, 358 U.S. 415 (1959).

## I. THE LOWER COURTS ERRED IN TURNING OVER TO THE DEBTOR THE RESPONSIBILITY FOR MAILING THE NOTICE OF BAR DATE TO ALL CREDITORS WITHOUT IMPLEMENTING APPROPRIATE SAFEGUARDS TO ENSURE THAT THE NOTICES WERE ACTUALLY SENT.

This Court has previously emphasized that diligent efforts must be undertaken to ensure that notice of the deadline for filing proofs of claim is delivered to all creditors. *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 297 (1953) ("But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred"); *cf. Pioneer Investment Services. Co. v. Brunswick Associates Ltd. Partnership*, 113 S. Ct. 1489, 1499-1500 (1993) (criticizing form of notice of bar date). Where, as here, a creditor's address is known to the bankruptcy debtor, notice of the claims bar date must be sent to the creditor by mail. *City of New York v. New York, N.H. & H.R. Co.*; *New Pentax Film, Inc. v. Trans World Airlines, Inc.*, 936 F. Supp. 142, 148 n.2 (S.D.N.Y. 1996) (*Wall Street Journal* publication did not amount to sufficient notice to Italian company of proof of claim deadline).

In the instant case, the courts below should not have turned over to the Debtor all responsibility for ensuring that the Bar Date notice would be mailed to all creditors. Because creditors who do not receive notice of a claims bar date will face an uphill battle in obtaining allowance of their claims—as manifested in the instant case, *see* Part II, *infra*—an obvious disincentive exists on the part of the bankruptcy debtor to ensure that such notices are properly mailed. Indeed, it is likely that the slipshod procedures employed by the Debtor and its agent were the result of such a disincentive. *But see*

*Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950) ("But when notice is a person's due, process which is a mere gesture is not due process. *The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it*" (emphasis added)).

In large Chapter 11 cases, it is fairly common for Bankruptcy Courts to turn over to the bankruptcy debtor the responsiblity for mailing notices. *Accord* 8 Lawrence P. King, *Collier on Bankruptcy* ¶ 2002.18 at 2002-48 (15th ed. 1996) ("In large cases, the debtor may serve notices"). This Court should exercise its supervisory power to require that appropriate safeguards be implemented to ensure that the debtor exercises diligence in mailing notices when obvious disincentives on the part of the debtor to ensure proper mailing exist.

## II. THE LOWER COURTS ERRED IN PRECLUDING ANTEL FROM INTRODUCING EVIDENCE TO REBUT THE PRESUMPTION OF RECEIPT AFTER MAILING.

The common law has long recognized that when a properly addressed letter with sufficient postage is placed in a post office, a presumption arises that the letter was actually received by the person to whom it was addressed. *See, e.g., Hagner v. United States*, 285 U.S. 427, 430 (1932); *Konst v. Florida East Coast Railway*, 71 F.3d 850, 851 (11th Cir. 1996). As discussed below, however, at least three different rules have evolved in the federal Circuits as to the quantum of evidence sufficient to defeat the presumption of receipt.

The Sixth Circuit holds that testimony of nonreceipt, standing alone, is sufficient to rebut the presumption of receipt.

*See Bratton v. Yoder Co. (In re Yoder Co.)*, 758 F.2d 1114, 1118 (6th Cir. 1985).

The Seventh and Ninth Circuits require a somewhat stricter measure of proof; in those jurisdictions, a "denial of receipt standing alone does not rebut the presumption, but merely creates a question of fact." *Appeal of Landahl, Brown & Weed Associates, Inc. (In re Longardner & Associates, Inc.)*, 855 F.2d 455, 459 (7th Cir. 1988), *cert. denied*, 489 U.S. 1015 (1989); *see Nunley v. City of Los Angeles*, 52 F.3d 792, 796 (9th Cir. 1995) ("When a movant specifically denies receipt of notice, a district judge must then weigh the evidence and make a considered factual determination concerning receipt, rather than denying the motion out of hand based upon proof of mailing").

Finally, in the Fifth Circuit, once evidence of proper mailing has been established, the presumption of receipt cannot be defeated:

> Evidence that the notice was never mailed or that no other creditor received notice will rebut the presumption that proper notice was given. [*In re Schepps Food Stores, Inc.*, 152 B.R. 136, 140 (Bankr. S.D. Tex. 1993).] "In effect, the presumption may only be overcome by 'evidence that the mailing was not, in fact, accomplished.'" *Id.* (quoting *Osborn v. Ricketts (In re Ricketts)*, 80 B.R. 495, 498 (9th Cir. BAP 1987) (Jones, J., concurring)).

*Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Manufacturing, Inc.)*, 62 F.3d 730, 735 (5th Cir. 1995). In upholding the Bankruptcy Court's determination that Antel was not entitled to present evidence in an effort to defeat the presumption of receipt, the Third Circuit has apparently aligned itself with the Fifth Circuit on this issue.

The viewpoint that an irrebuttable presumption of receipt arises upon proof of mailing, however, conflicts with the prior teaching of this Court. In *Rosenthal v. Walker*, 111 U.S. 185, 193-94 (1884), the Court explained that the presumption of receipt upon mailing

> "is not a conclusive presumption of law, but a mere inference of fact, founded on the probability that the officers of the government will do their duty and the usual course of business; and, when it is opposed by evidence that the letters never were received, must be weighed with all the other circumstances of the case, by the jury in determining the question whether the letters were actually received or not."

(Quoting *Huntley v. Whittier*, 105 Mass. 392 (1870).)

As the *Rosenthal* case recognizes, an inviolable presumption of receipt upon proper mailing naively presumes that the United States postal system is infallible. Such a rule is, moreover, more likely to result in injustice when, as in the case at bar, a letter was sent by regular mail overseas, for the obvious reason that the probability of misdelivery or loss is much higher than that associated with domestic mail.

This Court should grant the petition for certiorari in order to reverse the error of the courts below and to resolve the conflict among the Circuits with regard to the quantum of proof sufficient to defeat the presumption of receipt.

## III. THE COURTS BELOW ERRED IN PRECLUDING ANTEL FROM FILING A LATE PROOF OF CLAIM UNDER RULE 9006(b)(1).

Whether or not the lower courts in the instant case agreed with this Court's interpretation of the excusable neglect standard announced in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 113 S. Ct. 1489 (1993), they were required to apply it in the case at bar. Analysis of the *Pioneer* factors under the circumstances of this case leads ineluctably to the conclusion that Antel should have been allowed to file a late proof of claim.

In determining whether the creditor of a Chapter 11 debtor is entitled to file a late proof of claim under Rule 9006(b)(1), *Pioneer* instructs that four factors must be considered: (1) the danger of prejudice to the debtor, (2) the length of the delay and its potential impact on the judicial proceedings, (3) the reason for the delay, and (4) whether the movant acted in good faith. The courts below addressed only two of the factors—the danger of prejudice to the bankruptcy debtor and the reason for delay. There is general agreement among the appellate courts, however, that a bankruptcy court *must* weigh all four *Pioneer* factors before declining to permit a late-filed claim. *See Chemetron Corp. v. Jones*, 72 F.3d 341, 350 (3d Cir. 1995) ("Although the totality of the circumstances analysis conducted by the district court was more appropriate than that conducted by the bankruptcy court, the district court's analysis also fell short of that required under *Pioneer*. . . . Accordingly, we remand this issue to the bankruptcy court, with directions that the bankruptcy court undertake a more comprehensive and thorough determination of whether the totality of the circumstances support the claimants' defense of 'excusable neglect'"); *Resolution Trust Corp. v. SPR Corp. (In re SPR Corp.)*, 45 F.3d 70, 72 (4th Cir. 1995) ("[T]he *Pioneer* test requires [a court] to balance all relevant factors"); *Jones*

*Truck Lines, Inc. v. Foster's Truck & Equipment Sales, Inc. (In re Jones Truck Lines, Inc.)*, 63 F.3d 685, 687 (8th Cir. 1995) ("Because the Bankruptcy Court failed to make a finding on one of the *Pioneer* factors, we will now consider whether the evidence relating to that factor supports the court's conclusion that late filing was due to excusable neglect. . . . In these circumstances, we conclude that [the creditor] was not prejudiced by the delay. This record would not support a finding to the contrary, so we make this ruling as a matter of law"). As discussed below, all four factors clearly militate in favor of a finding of excusable neglect here.

First, it is difficult to conceive of a scenario in which a delay in filing a proof of claim could result in less prejudice to a bankruptcy debtor. In light of the facts that (1) AT&T filed a proof of claim on behalf of the Debtor well before the date of confirmation of the Debtor's plan, (2) sufficient funds were held in escrow at the time Antel filed its proof of claim to pay Antel's claim in full, and (3) the Indemnification Agreement specifically contemplated that creditors such as Antel would be permitted to file proofs of claim under Rule 9006(b)(1), no prejudice would befall the Debtor if Antel's claim were allowed. Allowance of Antel's claim would merely prevent the Debtor's windfall receipt of funds rightfully owing to Antel.

For similar reasons, the length of the delay in allowing Antel's proof of claim would have little impact on the judicial proceedings. As previously noted, the Debtor and AT&T, in the Indemnification Agreement, expressly accounted for the possibility that late-filed claims would be allowed under Rule 9006(b)(1).

Nor was the reason for delay within the reasonable control of Antel. Antel's management did not learn of the Bar Date until after it had passed. Even assuming, however, that the notice of the Bar Date was actually delivered to Antel's premises, the mailroom staff's failure to route it to the

appropriate officer of Antel would have been attributable to the fact that the letter was not addressed to a specific employee of Antel and was written in English. Thus, even if the courts below were correct in concluding that the Debtor's proof of proper mailing gave rise to an irrebuttable presumption of receipt, they erred in placing almost exclusive reliance on the third *Pioneer* factor, focusing on the reason for delay, in concluding that Antel's neglect was inexcusable. *See Jones Truck Lines, Inc. v. Foster's Truck & Equipment Sales, Inc. (In re Jones Truck Lines, Inc.)*, 63 F.3d at 687-88 (where Bankruptcy Court found that "reason for delay" factor weighed "heavily" against a finding of excusable neglect, but where delay resulted in no detriment to either bankruptcy debtor or Bankruptcy Court, appellate court held that Bankruptcy Court "gave too much weight to this factor in its excusable neglect analysis" and remanded for proper analysis of *Pioneer* factors).

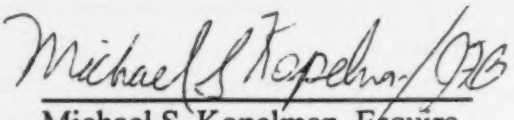
Finally, the record is devoid of anything to suggest that Antel acted in any way other than in good faith. Given the fact that the amount of money at stake here is a significant sum from the perspective of the government of El Salvador, it is straightforward that Antel would have acted diligently to protect its rights in the money if its officers had received the notice of Bar Date.

As this Court explained in *Pioneer*, one of the central aims of Chapter 11 is to avoid forfeitures by creditors. *Id.* at 1495. Here, the Court should grant Antel's petition in order to correct the error of the courts below in erroneously permitting Antel to forfeit a significant sum and thereby creating a windfall in favor of the Debtor.

## CONCLUSION

For all of the foregoing reasons, Antel requests this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,



Michael S. Kopelman, Esquire
51 Main Street
Hackensack, New Jersey 07601
(201) 489-5500
Attorney for Petitioner

NO. _____

*In The*
*Supreme Court Of The United States*

October Term, 1996

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In re:
NEW VALLEY CORPORATION,
Reorganized Debtor.

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ADMINISTRACION NACIONAL DE
TELECOMUNICACIONES ("ANTEL"),

PETITIONER,

v.

NEW VALLEY CORPORATION,

RESPONDENT.

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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# *APPENDIX*

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Michael S. Kopelman, Esquire
51 Main Street
Hackensack, New Jersey 07601
(201) 489-5500
Attorney for Petitioner

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FILED
JAMES J. WALDRON
U.S. BANKRUPTCY COURT
NEWARK, NJ
BY /s/, DEPUTY

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | Case No : 91-27704 |
| New Valley Corporation | ) | Chapter: 11 |
| | ) | |
| | ) | Hearing Date: April 3, 1995 |
| Debtor(s) | ) | |

ORDER DENYING MOTION TO ALLOW LATE CLAIM OF ADMINISTRACION NACIONAL DE TELECOMMUNICACIONES

A motion or application having been filed on Januar 18, 1995 by Michael Kopelman, Esquire, on behalf of the creditor, for an order as set forth above, all interested parties having been duly served, the Court having considered all of the papers submitted, along with any arguments of counsel, and for good cause shown,

It is on this 7th day of April, 1995

ORDERED, that the aforesaid motion is denied.

The moving party shall serve a copy of this order on the debtor, any trustee and all parties who entered an appearance on this matter.

NOVALYN L. WINFIELD

Honorable Novalyn L. Winfield,
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on April /s/ 10 , 1995 I mailed a copy of the foregoing order to the following:

Michael S. Kopelman, Esquire
Liebowitz Hauser Jurecky & Kopelman
2050 Center Avenue
Fort Lee, NJ 07024

James J. Waldron,
Clerk

/s/
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

| | | |
|---|---|---|
| In the Matter of: | : | Docket #: 91-27704 |
| | : | (NLW) |
| | : | |
| NEW VALLEY CORPORATION, | : | Newark, New Jersey |
| | : | April 7, 1995 |
| | : | 10:00 a.m. |
| Debtor | : | |

TRANSCRIPT OF MOTION TO ALLOW LATE CLAIM
BEFORE THE HONORABLE NOVALYN L. WINFIELD
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

| | |
|---|---|
| For the Debtor: | Kasowitz, Hoff, Benson, Torres & Friedman<br>By: LORIE BEERS, ESQUIRE<br>875 Third Avenue<br>New York, New York |
| For the Creditor: (Antel) | Liebowitz, Hauser, Jurecky & Kopelman<br>By: MICHAEL S. KOPELMAN, ESQUIRE<br>2050 Center Avenue, Suite 400<br>Fort Lee, New Jersey 07024 |
| E.R.S. Operator: | Keith Davis |
| Transcriber: | Sandra Carbonaro<br>New Jersey Transcription<br>77 Hamilton Avenue<br>Fords, New Jersey 08863<br>908-738-0633 |

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

MS. BEERS: Good morning, Your Honor. Lorie Beers, Kasowitz, Hoff, Benson, Torres & Friedman for New Valley Corporation.

MR. KOPELMAN: Michael Kopelman appearing for Antel.

If Your Honor please, this is Antel's application to file a late claim. It's in the sum of $225,000. As I indicated in a phone conference yesterday, Antel does have two representatives here to testify. But I believe that Your Honor has already made a preliminary ruling not to allow their testimony. Nevertheless, to supplement the record as to what the testimony would be if it were allowed, I'd like to make the following proffer.

Mr. Carl Aviles (phonetic) is the general manager of Antel. And he has with him, which I would actually like to mark for identification, the complete incoming log of correspondence, foreign correspondence, for the time period in question, which is around July 8th of 1993. Mr. Aviles -- I also took the deposition of Logan & Company, Brian Logan. And there were --

THE COURT: That's annexed to your reply papers, I think, isn't it?

MR. KOPELMAN: Yes, portions of it. The important part of his testimony though is that there were only two mailings that were allegedly sent to Antel. The first was the 341a notice and the bar date, and a proof of claim form. And the second one was a notice of hearing on disclosure statement, according to the testimony. Neither one of those documents were ever received by Antel.

Mr. Aviles will testify that he has personally gone to the incoming secretaries. They have never seen these forms.

He will, I have with me and would like to mark again the logs for the pertinent period of time in question, July 8th, 1993, and three months in either direction of that. In addition, I would like to introduce in evidence all of the returned notices that we got from Logan & Company, because I think it's very significant, Your Honor, that one, where you allowed a late claim, which is Guatel (phonetic), you allowed a late claim because Guatel changed its address. And Guatel notified New Valley of that change of address and alleged that they never received the bar date notice and so on.

Well, I have all the copies --

THE COURT: Well, but there's no indication here that there was an incorrect address, is there?

MR. KOPELMAN: No, not insofar as Antel is concerned.

THE COURT: In the Antel matter, okay.

MR. KOPELMAN: But my point is only this. If the Guatel notice was sent, it should have come back. Because Guatel didn't get it. It's not here.

In addition, there were two other companies, similar, these PTT carriers, which are in a special category. One is in the Marshal Islands and one I believe is in Syrian Nemeritis (phonetic) or something like that. They also filed an application so they claim. They also filed affidavits, if Your Honor please, before this Court, but they never received notices. Now it's true in those cases you disallowed the late claim.

THE COURT: Right.

MR. KOPELMAN: But, we have now four sworn affidavits before the Court, Guatel, the two that I just mentioned, and Antel.

THE COURT: Oh, I thought you meant -- okay.

MR. KOPELMAN: And the testimony that these gentlemen have come up from El Salvador to testify to, that absolutely positively they didn't get it. It's a small country, Your Honor. I just met Mr. Aviles, we spent yesterday preparing actually for his testimony and driving down here. It's a poor country. There is no way they wouldn't have responded. It's a responsible country, too. To this note, it's in a timely fashion, if it in fact it was received.

We've gone through the trouble of deposing the Logan & Company, which was not done in the other two cases where you didn't allow the late claim. And we found something very remarkable. We found that Logan & Company didn't make the mailing. Rather, a company by the name of Avalone Direct (phonetic) made the mailing. And I supplied the deposition transcripts. Avalone Direct, they don't know who from Avalone Direct actually mailed it. They don't know who supervised it, if anyone, from Logan. There was no check-off, like as each letter went out. I think we've rebutted that presumption of mailing.

And I strongly feel that the, although you've overruled the testimony, it would not take long, to just go through it, and I proffer it again, that these, the only two notices in the whole case, and four PTT carriers have stepped up and said we never got it, sworn affidavits, Logan & Company didn't mail it, they gave it to somebody else. They filed a proof of mailing that said they caused it to be mailed. I say to Your Honor I don't think that's really proper or adequate. The normal affidavit of mailing, as Your Honor is very well aware, says I'm employed by Logan & Company and I put it in the Post Office mailbox.

That isn't what this one says. There was also confusion as to the dates. Even here, Katie Logan, the sister of Brian Logan says it was mailed on July 9th. The affidavit said it was mailed on June 23rd. It was corrected. There were typographical errors. We didn't get it. And we're prejudiced by the fact that we didn't get it.

Now I know I was overruled yesterday, but I am making this impassioned speech because these gentlemen did fly all the way here to New Jersey to let Your Honor know the seriousness with which this would have been met had it been received, and the plain and simple fact that our documentary evidence proves that we didn't get it. We have normal records in the course of our business. And they're in my hands. So I know that Your Honor ruled, but nevertheless for the record --

THE COURT: No, I'm not going to hear testimony today.

MR. KOPELMAN: All right. Then what I would like to do, just for the completeness of the record, is to mark these two exhibits, the logs that I've just mentioned and the return that --

THE COURT: And who created the logs?

MR. KOPELMAN: Antel.

THE COURT: No, who at Antel created the logs?

MR. KOPELMAN: Atilio Gonzalez (phonetic).

THE COURT: Okay. I'm not taking that in then. No. I mean, I accept for the purposes of the record that it's the contention of Antel that they didn't get the communication.

MR. KOPELMAN: They didn't get it.

THE COURT: I accept that that's their contention, yes.

MR. KOPELMAN: All right, well the second contention then, Judge, is that there's no prejudice here, for the reason that AT&T filed a co-debtor type of claim with respect to Antel's specific amount, in the amount of $135,000 --

THE COURT: Well, but you now assert a claim for 225, don't you?

MR. KOPELMAN: Yes, and we have the discrepancies, Your Honor, which Mr. Monzano (phonetic) is here and has made a coded comment. Basically what this boils down to is there was a difference in rate as between a dollar and a dollar fifty, and some omitted items. And he will testify in detail as to why the AT&T Easy Link computation of $135,000 is in fact an error, and it should be $225,000.

But as I understood Your Honor's comments yesterday, the purpose of today's hearing in any event is, is the claim going to be allowed? Perhaps if it is allowed, we could discuss or I could put forth our contentions as to the amount at a later date. But what I'm saying is no prejudice is at least to the amount of $135,000. Because there, the debtor had in fact signed a requisition form which I got in discovery and provided to the Court, to pay Antel 134,700 or so. And, not only that, but they didn't pay, even though request by AT&T Easy Link to do so. But they sent a letter saying that we owe you $134,000 but we want to pay 18 percent because an involuntary petition bankruptcy had been filed at that time, not an adjudication of bankruptcy. And there's no proof that that was accepted by Antel or anything else. In fact, for that matter, even received by Antel.

But the whole point of the testimony is, and the submissions are, is that this claim, there was no data between AT&T Easy Link and the debtor that it was valid in the amount

of 134,000 and change. And if that sum had been simply put on the petition, because apparently New Valley was satisfied that that was due and owing and they made an offer for 18 percent of that, then it should have been listed for $134,000. And we would have received that money.

Your Honor, that's all I have. But I would like just to complete the record, to mark at least the log for identification, and also the returned notices that I received in discovery.

THE COURT: Okay. I'm sorry, I was reading. You said what Mr. Kopelman?

MR. KOPELMAN: I just wanted to mark for identification today the log that I referred to and also the returned notices that I received in discovery.

THE COURT: For what purpose, if you're marking them only for identification?

MR. KOPELMAN: Only for identification. For the purpose of the record.

THE COURT: On appeal I assume. Sure, mark them for identification. Make that A-1 and 2 for identification, A for Antel.

MS. BEERS: Your Honor, since we're marking them for identification, I would raise an objection on behalf of the debtor that I don't believe that, number one, we've never seen the log. Number two, the individual who prepared it is not here. I do not believe it satisfies the business record exception to the hearsay rule. We would object to the entry of both of them in the record on the basis of hearsay.

THE COURT: Well, they're certainly not being admitted into evidence.

MS. BEERS: For the record.

THE COURT: I don't even know that it makes any difference that I mark them for identification. But so that Mr. Kopelman has a record that he in fact referenced them, I think it's reasonable.

Okay, Ms. Beers?

MS. BEERS: Good morning. Your Honor, in the first instance, New Valley disputes that Antel has satisfied its burden of overcoming the presumption of mailing which is set forth in the Taj Mahal case. The mere assertion that notice was not received certainly does not rebut the presumption of mailing, as set forth in that case and held in this district.

Your Honor, Antel does not dispute that the address to which all correspondence was mailed was indeed the address of the Antel Communications Authority. Indeed, in Mr. Sessa's certification, which was originally filed with this Court on or about January 12th, Antel acknowledged that in fact it could have received notice, that a majority of its staff did not speak English and that at the time if a proof of claim were in fact sent and received by Antel, that it may have been mishandled or discarded.

So I don't believe, what we're hearing today is slightly different from what was originally contained in Mr. Sessa's certification. But certainly the story is changing a little bit, but in fact I don't think they have in any event overcome the presumption of mailing.

As indicated in Ms. Logan's affidavit which was attached to our original response to the motion to allow the late claim, Logan & Company did indeed mail all the notices to the addresses provided by New Valley. Antel now claims that because Logan & Company did not specifically mail the

documents themselves, that Avalone Direct mailed them, that somehow overcomes Ms. Logan's certification.

Your Honor, we would point out that during the course of this case, Logan & Company, who is well known to the Court, has provided various mailing services in connection with this case. And indeed, Avalone Direct has also provided the actual physical mailing of those documents for a number of the mailings including but not limited to the notices of confirmation, notices of the disclosure statement hearing, and the notices of the bar date.

Your Honor, I think that the record is fairly clear, more than 15,000 notices were sent out in this case in connection with the bar date and the various and sundry other hearings by this Court. The very small amount of returned mail which was received by Logan & Company is indicative of the fact that those mailings have gone relatively without event. And the fact that more than 1100 proofs of claim were filed in this case indicates that certainly the notices of the bar date were indeed mailed and they were in fact responded to by the vast majority of creditors in this case, including but not limited to other PTT carriers who filed for claim directly.

Your Honor --

THE COURT: Those other carriers being carriers obviously outside the Continental United States.

MS. BEERS: Yes, Your Honor. We are referring, for purposes of this hearing, when we refer to PTT carriers, only to international carriers.

Your Honor, Mr. Kopelman suggests that somehow there was an impropriety in the mailing. I don't believe either the sections of Mr. Logan's affidavit which are attached to the reply certification at Exhibit C indicate that they have, that it

was any propriety. There was certainly a typographical error in the certifications provided to this Court, and they were corrected as soon as the error was discovered, an event which occurred in 1993. And certainly it has not been indicated that that in any way affected the actual timing of the mailing.

Significantly, Your Honor, Antel acknowledges that it knew in August of 1994 that New Valley was in a proceeding. And yet it was not until January that they filed their motion to allow their late proof of claim. Mr. Kopelman suggests that Antel would have acted promptly and responsibly, yet they acknowledge that it took them more than five months to file a motion to allow their late proof of claim. So I think that to suggest that they would have acted promptly is somewhat disingenuous before this Court.

As the Court is aware, confirmation occurred in this case in November of '94. Had they filed the late proof of claim in August we might be having a different conversation today. The fact of the matter is that New Valley has confirmed its Chapter 11 plan. It confirmed it in November of '94. It is fully implemented. Both closings have taken place, distributions have [been] made to all creditors in the case. And the need for finality in connection with this case is abundantly clear, particularly from the earlier conversations which the Court had with counsel this morning, there is a need to get this case to a conclusion. The Court acknowledged that need for finality in connection with its overruling of a similar motion to allow late filed proof of claim filed by Marshal Islands and Syria. There is simply no, it is dangerous precedent to create at this late juncture to allow late filed proofs of claim, when there has been absolutely no showing of excusable neglect, and there is certainly no overcoming of the presumption of mailing. Moreover, Your Honor, as we've discussed on several prior occasions, there is in place an agreement which covers the Antel claim.

THE COURT: The AT&T Easy Link agreement.

MS. BEERS: That is correct, Your Honor. Mr. Kopelman disputes that indeed that agreement protects his client. However, I think it's abundantly clear from a reading of the agreement that were Antel to make a claim or offset against amounts due AT&T, AT&T can indeed come back against New Valley for amounts which it agreed to indemnify it for. Those amounts, those accounts have been set up. Those indemnification transactions have indeed been occurring between New Valley and AT&T, and that was the purpose of that agreement.

It is dangerous at this juncture to allow late filed proofs of claim where there's a procedure in fact in place to accommodate those things.

Finally, Your Honor, I will point out to the Court, and this simply goes to the diligence of the claimant. This debt was incurred from 1985 to 1990. It's 1995. Five years have elapsed since the last claim upon which Antel moves was incurred. There has been a significant delay by Antel in collecting amounts that were due it. The prejudice --

THE COURT: Well, in fairness, somewhere around '91 didn't they attempt to get payment --

MS. BEERS: I believe it was 1992. And indeed, as Mr. Kopelman acknowledges, New Valley wasn't in involuntary proceeding at that time, in fact which should have put Antel on notice that perhaps this was a situation that required a little bit, a greater degree of scrutiny than perhaps another type of situation.

But the fact remains that it is, this debt is not something that occurred a year ago. It is something that occurred, the latest of which occurred five years ago, the earliest was more

than ten years ago when these claims started accruing. Mr. Kopelman suggests that New Valley should have somehow listed on its schedule the amount that was not in dispute. As the Court is aware, these PTT claims are the subject of, or have continued to be the subject of a large degree of dispute. They were all listed as contingent and unliquidated simply for the purpose that not all Telex traffic had cleared at the time of the filing of the involuntary. It was not entirely clear which claims were going to fall into gap period claims, which claims were going to fall into general unsecured claims, and as a result, all of the claims for which Telex traffic had not cleared were categorically listed as contingent and unliquidated because it was unknown to the debtor at that time whether all resolution or settlement amounts had been in fact cleared.

So Your Honor, for all of those reasons, and for the reasons set forth in our initial response, we respectfully request that this Court deny the motion to allow the late filed proof of claim.

MR. KOPELMAN: If I may just briefly respond, Your Honor.

THE COURT: Sure.

MR. KOPELMAN: My adversary says that there were two mailings and they were including but not limited to the bar date and the notice of the close on confirmation, but she didn't mention any others. And the testimony at the deposition was there were only two that were sent to Antel. And the testimony that I would seek to proffer is they didn't receive either one of them.

Also my adversary says that there was other PTT carriers that filed claims, but that's not part of this particular record. That may be true, but I'm not aware of them, and they're not indicated in her papers.

The next point is that AT&T and New Valley had set up a particular escrow fund with $135,000 in it to cover my client's losses.

One further proffer, because my adversary brought it up, Mr. Aviles will testify, because I went over it with him yesterday, they have no right to set-off against AT&T Easy Link. And they are not going to do that. So for my adversary to suggest that they have a remedy under the agreement is disingenuous because we don't in fact have a remedy. We don't have any claims against AT&T Easy Link. Rather we have a claim against New Valley that New Valley knew about, because New Valley signed, and you have in front of you, a requisition for payment of $134,700. All the parties signed it, AT&T Easy Link and New Valley. But they didn't pay. So I think it is a little bit disingenuous since everybody signed off of it at New Valley's point to say that they shouldn't, that they didn't know it, it should've properly been listed as unknown and all those things. The fact of the matter is, I believe that my client is trying to get short shrifted, and the ultimate beneficiary is the debtor. Because at the end of the one year period, that escrow account, whatever is in it, goes to New Valley. Rather than a claim that you have before you which they admit is due and owing.

THE COURT: Well, they admit that Antel was a creditor in the sense that it had a claim. I don't know that they, and I don't know that they would agree necessarily as to the amount of the claim now.

MR. KOPELMAN: Well, I don't -- I would say this. We put in before the Court, it's listed in the AT&T agreement as the same number that was listed several years prior to the AT&T Easy Link and the New Valley documents, and also in the same 18 percent offered, all the same number, it's carried through, $134,700. So I don't know, but you did say the amount is for another day but I suggest they would have a very

very hard time trying to argue against at least that $134,000 number at this juncture.

We're here prepared to prove the amount of the claim. If they're not prepared, we can have an adjournment for that. But I think on the basis of what's before you, and the discovery that we took and the AT&T agreement especially which lists the exact name [sic] number carried out. We certainly feel that's a just debt. And they will be unjustly enriched at the end of this whole proceeding a year from now when they go to AT&T, they're entitled to our money. And I don't think that that's right. That's all.

THE COURT: Real briefly.

MS. BEERS: Two points, Judge, in response to Mr. Kopelman's reply. The first is that I believe the record is in this bankruptcy proceeding is perfectly clear, and it is clear in connection with all of the claims filed in this case which I believe the Court is aware of, that other PTT carriers did indeed file proofs of claim, whether or not Mr. Kopelman has reviewed the claims made in this case, I'm sure if he did review it, he would discover that indeed that is the case.

Finally, Your Honor, I wanted to mention in my earlier presentation that the Guatel claim to which Mr. Kopelman referred where he alleges that they did not receive notice of the proof of claim, I would point out to the Court that that was the subject of a stipulation between the debtor and Guatel in connection with whether or not that proof of claim ought to be allowed. And indeed we did allow that proof of claim, I believe on November 2nd. But that was the subject of some negotiation between the debtor and New Valley and Guatel. That was not a claim which this Court ruled upon as a late filed proof of claim.

Your Honor, the other point that I would like to address is the unjust enrichment. When New Valley entered into settlement negotiations with AT&T, it took the case as it found it. It took the proofs of claim which were filed, and it tried to make an accommodation. The unjust enrichment in fact in this case to the extent that late proofs of claim are permitted, actually worked in favor of AT&T. Because to the extent we've basically been indemnified for the claim and paid it. And that increases the amount of the indemnity to AT&T. We tried to roughly approximate 50 percent when we created the indemnification. So to the extent that late proofs of claim are now allowed, we've basically indemnified AT&T for additional sums. And the fact is that it is prejudicial to New Valley because we took the facts and circumstances as we found them when we entered into that agreement. And Your Honor, we would respect-fully request that a prejudice of that sort not be permitted to work against New Valley.

THE COURT: Okay. All right, as a preliminary matter, as I indicated earlier, I accept the position of Antel, but it's their position that they simply didn't receive either notice that is indicated in the Kathleen Logan certification as having been made.

I also agree that Antel, as a creditor with a known address, was entitled to actual notice. But I also think, first of all that Ms. Logan's certification of January 30th, '95, amply demonstrates that that notice of the bar date, which is the critical notice here, was in fact mailed, as indicated in that certification, the information for mailing creditors was taken from the debtor's schedule, the name and the address, then printed on a claim form and a notice and then mailed. It is true that Ms. Logan or Brian Logan, that neither of them physically mailed the notice. But they followed with this notice a procedure that was in place for noticing that they have followed in other instances. I have previously found in connection with two other I think objections of this nature, the

Marshal Islands I recall, I don't honestly recall the Syrian one. But that procedure had sufficient safeguards in it such that the mailing was accurately made. And I have previously found and do still find that the proof of that is in the fact that the format that I just indicated to you was followed, that is from the debtor they got the names and addresses, it was all put on the forms and then the forms were mailed out. And the fact that frankly, compared to the number of notices sent, there have been relatively few returned. So frankly I find the procedure for how notices were sent out to have been sufficient.

I think Judge Gambardella's decision in the Trump Taj Mahal case is applicable and controlling here. I think that by following the procedures I've just outlined, Logan and thereby the debtor have satisfied the presumption that the notice was sent. And therefore have both likewise, the presumption works that the presumption of the sending of the notice leads to a presumption that the notice was received. Where there is a correct address. I think you get into some difficulties where there's an incorrect address and the debtor had knowledge particularly that, or had been provided with the correct address.

I would note too I think in this connection, I think there was and is some burden on Antel to have protected itself as early as 1992. It knew of the involuntary proceeding. So it's not as if throughout this matter they were unaware of the bankruptcy. Though perhaps early as of that moment for that matter they could have chosen to have filed a proof of claim. They need not have waited to the bar date, although I would concede as --

(Tape #1 ends; Tape #2 begins)

THE COURT: -- known creditors to the debtor, they were entitled to that notice. But I think they could have also protected themselves somewhat.

I am not persuaded that there is no prejudice to the debtor. I am not a big fan of the Pioneer decision in the first instance. I think that decision runs counter to the need in bankruptcy cases in general to have certitude and finality in the proof of claims process. I think only when there is demonstrable excusable neglect could there be any variation in the bar date. It seems equally likely to me here that parties simply didn't recognize what the document was that was received. And that problem I think has to lie with the recipient rather than with the debtor, who I don't think in a bankruptcy has to be charged with the obligation to print every notice in every foreign language of every country to which it might be sending communications.

I'd further point out that as Ms. Beers indicated, the confirmation has taken place, claims have been paid. I think there is a need for that kind of finality to occur here. I think once I have to look at this not only from the point of view of this claim but other late claimants that I have ruled against, that if you open it up for no reason other than there's an allegation that it wasn't received, then I ought to allow every late claim. And I don't think that is a proper basis.

I further have accepted and still accept the contention that the PTT claims were scheduled by the debtor as contingent, because of the billing process with regard to those claims, that even though there may have been some certitude as to some portion of what that claim might have been back in 1992, that doesn't mean that there wasn't some concern that that claim could have been something more or something less.

Accordingly, though I find in fact that it probably does work a hardship on Antel, that fact alone is not a sufficient reason to permit the late filing of a proof of claim, particularly where I find that the debtor has met the requirements for being accorded the presumption of mailing.

So the motion to file a late proof of claim is denied.

MS. BEERS: Thank you, Your Honor.

THE COURT: I'll do a Court Order. I don't know that I have an Order.

(Matter concluded)

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| EXHIBITS | | MARKED |
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I, Sandra Carbonaro, certify that the foregoing is a correct transcript, from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Sandra Carbonaro

Sandra Carbonaro AOC #259

April 28, 1995

FILED
OCT 27 1995
AT 8:30 ___M
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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|---|---|
| In re<br><br>NEW VALLEY CORPORATION,<br><br>Debtor | Bankr. No. 91-27704 (NLW) |
| ADMINISTRACION NACIONAL DE TELECOMUNICACIONES,<br><br>Appellant<br><br>v.<br><br>NEW VALLEY CORPORATION<br><br>Appellee. | Civ. No. 95-2345 (WGB)<br><br>ORDER |

This matter having come before the Court on the appeal of an April 7, 1995 Order of the Bankruptcy Court, Winfield, J. and an application by Appellant for an Order holding $226,657.43 in escrow; and

The Court having considered submissions of counsel on behalf of the parties; and

For good cause shown;

It is on this 27th day of October, 1995 ORDERED that the April 7, 1995 Order of the Bankruptcy Court denying Appellant's motion for leave to file a late proof of claim is affirmed and Appellant's application for an Order holding $226,657.43 in escrow is dismissed as moot.

/s/ William G. Bassler

WILLIAM G. BASSLER, U.S.D.J.

NOT FOR PUBLICATION

FILED
OCT 27 1995
AT 8:30 ___M
WILLIAM T. WALSH
CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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APPEARANCES:

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Attorneys for Appellee

BASSLER, DISTRICT JUDGE:

Administracion Nacional De Telecomunicaciones ("Antel") appeals an April 7, 1995 Bankruptcy Court Order denying Antel's motion to allow a late proof of claim to be filed. This Court's jurisdiction is pursuant to 28 United States Code Section 158.

## I. BACKGROUND

Appellee New Valley Corporation ("New Valley") is a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. 11 U.S.C. §§ 1107-08; Appendix to Appellant's Brief at 34 ("A.___"). Prior to the initiation of Chapter 11 proceedings, New Valley's predecessor, the Western Union Corporation, utilized telex transmission networks owned by Antel. Antel claims that New Valley owes Antel $225,657.43 arising from Western Union's use of its telex lines. (A.5).

By Order dated June 21, 1993, Bankruptcy Judge Winfield fixed September 30, 1993 as the "Bar Date" for filing proofs of claims. (A.35). The "Bar Date" served as a deadline for filing claims against the debtor, New Valley. The Bankruptcy Court Ordered that notice of the Bar Date be published and mailed to all creditors whose names were known to New Valley. (A.44-48).

New Valley published notice of the Bar Date in the Wall Street Journal, the New York Times, the Newark Star-Ledger and USA Today. On July 13, 1993, Brian C. Logan, New Valley's mailing agent, certified that he caused a copy of the Notice of Bar Date to be mailed to Antel at their last known address. (A.55). At his deposition, Mr. Logan indicated that Avalonne Direct Mailing physically mailed the envelope. (A.59-64).

AT&T Corporation ("AT&T") filed a Proof of Claim on behalf of certain third-party post telecom and telegraph carriers (the "PT&T Carriers") whose claims arose from New Valley's alleged failure to pay amounts due the PT&T Carriers. (A.69-73). AT&T, as successor to New Valley's PT&T business, filed their Proofs of Claim under the theory that the PT&T Carriers would subtract amounts New Valley owed them from the amounts they owed to AT&T. Antel was among the PT&T Carriers named in AT&T's Proofs of Claim. After New Valley objected to the AT&T Proof of Claim, the parties settled. The Settlement Agreement purported to resolve all potential issues and claims between New Valley, AT&T and PT&T Carriers. (A.74-103). As part of the settlement agreement, $2,000,000.00 was set aside in an escrow account to satisfy the potential PT&T Claims. (A.80). The settlement agreement provides that New Valley may withdraw funds from the escrow account on November 2, 1995. (Id.).

On November 1, 1994, the Bankruptcy Court confirmed New Valley's Chapter 11 Plan of Reorganization.

On January 18, 1995, Antel filed an application seeking permission to file a late proof of claim on the grounds of excusable neglect. (A.4-29). Along with the application, Antel submitted a certification stating that it did not receive notice of the bar date, or, alternatively, that it "easily could have been carelessly mishandled because it was in English, not Spanish." (Id.; Appellee's Brief at 3).

The Bankruptcy Court denied Antel's application, because: (1) Antel failed to overcome the presumption that New Valley mailed Antel the notice; and (2) Antel failed to make an adequate showing of excusable neglect. Antel filed this appeal. On October 23, 1995, this Court Ordered New Valley to show cause why this Court should not direct that the sum of $226,657.43 remain in the $2,000,000.00 escrow pending the decision of this appeal. For the reasons set forth

below, the Bankruptcy Court's decision is **affirmed** and Antel's application for an Order holding $226,657.43 in escrow is **dismissed as moot.**

## II. DISCUSSION

### A. Standard of Review

The Court reviews the refusal to allow a late proof of claim for abuse of discretion. In re Vertientes, Ltd., 845 F.2d 57, 59 (3d Cir. 1988). Factual findings made by the Bankruptcy Court may be disturbed only if clearly erroneous, while legal conclusions are subject to plenary review. FGH Realty Credit Corp. v. Newark Airport/Hotel Limited Partnership, 155 B.R. 93, 97-98 (D.N.J. 1993).

Antel urges the Court to apply a de novo standard of review to the Bankruptcy Court's determination that Antel failed to rebut the presumption of mailing, because the Bankruptcy Court based its findings on affidavit, as opposed to live, testimony. (Appellant's Brief at 2). Notwithstanding the fact that the Bankruptcy Court did not hear live testimony on the issue, determining whether a presumption of mailing was rebutted is at best a mixed question of law and fact, and is, as to the factual conclusions reached at least, entitled to a deferential standard of review.

### B. The Bankruptcy Court's Determination That Antel Failed to Rebut the Presumption of Mailing

The Bankruptcy Court's determination that Antel failed to rebut the presumption of mailing was not clearly erroneous. When mail is properly addressed, stamped and deposited in the postal system, there arises a rebuttable presumption that the notice was received by the addressee. In re Trump Taj Mahal Associates, 156 B.R. 928, 938 (Bankr. D.N.J.), aff'd, 1993 WL

534494 (D.N.J. 1993). The Bankruptcy Court's conclusion that Antel failed to rebut this presumption was well-grounded in the record before the court. Notably, the Bankruptcy Court found that, even though Brian Logan did not personally mail the notice to Antel, he followed "a procedure that was in place for noticing [that] had sufficient safeguards in it such that the mailing was accurately made." (A.123). The Bankruptcy Court found further proof of mailing in the fact that, while many notices were sent to New Valley's numerous creditors of record, "relatively few [were] returned." (Id.). Given these findings, the Bankruptcy Court's determination that Antel received notice of the bar date was not clearly erroneous.

C. The Bankruptcy Court's Determination That Antel Failed to Make an Adequate Showing of Excusable Neglect

The Bankruptcy Court did not abuse its discretion in finding that Antel was not entitled to file a late proof of claim on the grounds of excusable neglect. Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline "was the result of excusable neglect." Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 113 S. Ct. 1489, 1491-92 (1993). The determination is "at bottom an equitable one." Id. at 1498. The Supreme Court provided the following non-exclusive list of factors the bankruptcy court should consider: (1) the danger of prejudice to the debtor; (2) the length of delay and its potential impact on the judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. Id.

The Bankruptcy Court determined that allowing Antel to file a late proof of claim would prejudice Antel. Considering the settlement agreement negotiated between AT&T and New Valley, the Bankruptcy Court did not abuse its

discretion. New Valley and AT&T negotiated in light of the claims that had been filed against New Valley at the time of the negotiations. Allowing a late proof of claim could therefore deprive New Valley of the benefit of its bargain with AT&T regarding the PT&T Claims.

Further, the Bankruptcy Court determined that allowing Antel to file their claim in January 1995, months after the deadline and the confirmation of New Valley's Reorganization Plan, would negatively impact both the parties' and the judicial interest in finality. This decision, too, is not an abuse of discretion.

Because the Court affirms the Bankruptcy Court's denial of permission for Antel to file a late proof of claim, Antel's application for an Order holding the $226,657.43 in escrow is dismissed as moot.

## III. CONCLUSION

For the foregoing reasons, the Bankruptcy Court's April 7, 1995 decision is **affirmed** and Antel's application for an Order directing that $226,657.43 remain in escrow is **dismissed as moot.**

An appropriate Order accompanies this Opinion.

Dated: /s/ October 27, 1995

/s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

OCT 21 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-5806

IN RE: NEW VALLEY CORPORATION, Formerly known as
WESTERN TELEGRAPH COMPANY,
Debtor

ADMINISTRACION NACIONAL DE
TELECOMMUNICACIONES,
("ANTEL")

v.

NEW VALLEY CORPORATION

Administracion Nacional de Telecommunicaciones,
Appellant

Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 95-cv-02345
(District Judge: Honorable William G. Bassler)

Submitted Under 3rd Circuit LAR 34.1(a)
June 5, 1996

Before: BECKER, MANSMANN, Circuit Judges
and SCHWARZER,****** District Judge.

******. Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

## JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the order of the district court of October 27, 1995 be and is hereby AFFIRMED, essentially for the reasons set forth in Judge Bassler's opinion.

Costs taxed against appellant.

BY THE COURT:

/s/
Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

SEP 25 1996

Certified as a true copy and issued in lieu
of a formal mandate on October 17, 1996

Teste: /s/ P. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.